ERRATA

(a) Page 42, fourth line from bottom:
The word "arbitration" should be "abstention".

(b) Page 43, 12th line from the top:
The word "has" should be "have".

(c) Page 50, third line from bottom:
The word "urge" should be "urged".

Table of Contents

	Page
Reference to Official and Unofficial Reports	1
Jurisdiction	1
Constitutional Provisions, Statutes, Regulations and Rules	3
Questions Presented for Review	8
Statement of the Case	8
Summary of Argument	13
Argument	15
I. Neither the Statute nor the Proposed Regulations Under Attack, Whether Taken Separately or Taken as a Whole, Violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States	15
A. Summary of the Provisions of the Statute and Regulations Under Attack	15
B. Ch. 186, SLA 1968 is Permissible State Regulation Under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution	17
C. The Proposed Regulation, Sec. 102.09 of the 1969 Commercial Fishing Regulations is Permissible State Regulation under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution	32
II. Neither the Statute nor the Proposed Regulations Under Attack, Whether Taken Separately or Taken as a Whole, Violate Article VIII, Section 15 of the Alaska Constitution (prohibiting an exclusive right of fishery) or Article VIII, Section 3 of the Alaska Constitution (Reservation of fish and wildlife to the people for common use)	35
A. Ch. 186, SLA 1968 is Valid Under the Quoted Provisions of the Alaska Constitution	35
B. The Proposed Regulations are Valid Under the Above Quoted Provisions of the Alaska Constitution	40

Page

III. The Proceedings on the Merits of the Case Should Have Been Stayed or Abated by the District Court Pending the Determination by an Alaska Court of the Effect of Article VIII, Sections 3 and 15, Alaska Constitution Upon the Statutes and Regulations Here Involved 40

IV. Appellees' Motion for Summary Judgment was not Properly Granted in that the Court Assumed Facts not Properly Before It. 48

A. The District Court, in Granting Appellees' motion for Summary Judgment Assumed Facts not Properly Before It 48

B. The Court, if Appellants were not Entitled to Judgment as a Matter of Law, Should Have Denied Appellees' Motion for Summary Judgment and Determined the Merits at a Plenary Proceeding 49

Conclusion 52

Table of Authorities Cited

Cases

Pages

Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341 (1951) 44, 45

Baggett v. Bullitt, 377 U.S. 360 (1964) 47

Bozanich v. Reetz, 297 F.Supp. 300 (1969) 1

Burford v. Sun Oil Co., 319 U.S. 315 (1943) 43, 44

City of Meridian v. Southern Bell Telephone & Telegraph Company, 358 U.S. 639 (1959) 46, 47

Clay v. Sun Insurance Office, 363 U.S. 207 (1960) 47

Corsa v. Tawes, 149 F.Supp. 771 (D.C., Md., 1957) 32

Dombrowski v. Pfister, 380 U.S. 479 (1965) 47

Pages

Hynes v. Grimes Packing Co., 337 U.S. 86 (1949) ..36, 37, 38, 39

Kotch v. Board of River Pilot Commissioners for the Port of New Orleans, 330 U.S. 552 (1947) 26, 27

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) 28

McGowan v. Maryland, 366 U.S. 420 (1961) 17, 18, 19, 22, 23

Morey v. Doud, 354 U.S. 457 (1959) 28, 29, 30

New York Rapid Transit Co. v. New York, 303 U.S. 573 (1938) 23, 24

Railroad Commission of Texas v. Pullman Company, 312 U.S. 496 (1941) 41, 42, 44

Robinson v. State of Florida, 378 U.S. 153 (1964) 34

Romero v. Weakley, 226 F.2d 399 (9th Cir. 1955) 47

Walling v. Richmond Screw Anchor Co., 154 F.2d 780 (2nd Cir. 1946) 51

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 47

Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955) 31, 38

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 27

Zwickler v. Koota, 389 U.S. 241 (1968) 47

Constitutions

Alaska Constitution:
Section 3, Article VIII 3, 8, 10, 12, 14, 35, 39, 40, 43
Section 15, Article VIII 3, 8, 10, 12, 14, 35, 40, 43

California Constitution:
Section 25, Article I 43

Hawaii Constitution:
Section 3, Article X 43

Rhode Island Constitution:
Section 90, Article IV 43

Vermont Constitution:
Section 53, Article II 43

United States Constitution:
Section 1, Article XIV 3, 9, 12, 13
Fourteenth Amendment 8, 17, 18, 26, 28, 32, 40

Regulations

Pages

50 CFR 1946 Supp., Section 208.23 36

Proposed 1969 Commercial Fishing Regulations for State of Alaska, Section 102.09 .....passim

Rules

Federal Rule of Civil Procedure 56(c) 7, 48

Rules of District Court for the District of Alaska, Rule 5(H) (2) 50

Statutes

5 Alaska Administrative Code:

Section 39.110 15

Section 39.120(d)(1) 15

Chapter 186, Session Laws of Alaska, 1968 .....passim

16.05.250 ..... 2, 33

16.05.480 49

16.05.536 ..... 2, 4

16.05.540 .....2, 5, 31

28 United States Code:

Section 1253 2

Section 1331(a) 41

Section 2101(a) 2

Section 2284 2

White Act of June 18, 1926, 44 Stat. 752 .....35, 36, 39

Other Authorities

J. Garner, How to Make and Set Nets (1962), p. 69 20

Washington State Department of Fisheries, Pacific Northwest Marines Fishes (1967), p. 10-11 .....20, 21

Salmon, The Living Resource, Fisheries Association of B. C. (and other) Agency Press, Limited (Canada) 19, 20

p. 9 19

p. 10 20

p. 17 20

University of Washington, Publication in Fisheries, New Series, Vol. II, No. 1 Salmon Gear Limitations in Northern Washington Waters:

Pages 18-19 (1963) 21

Pages 35 and 36 21

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 185

AUGIE REETZ, Commissioner of Fish and Game for Alaska, et al.,
Appellants,

vs.

JOHN BOZANICH, et al.,
Appellees.

Appeal from the United States District Court for the District of Alaska

BRIEF OF APPELLANTS

OFFICIAL AND UNOFFICIAL REPORT OF OPINION DELIVERED IN UNITED STATES DISTRICT COURT

Bozanich v. Reetz, 297 F. Supp. 300 (1969)

JURISDICTION

The appeal herein is from a final decree made and entered on March 20, 1969, by the United States Dis-

trict Court for the District of Alaska, specially constituted as a District Court of three judges pursuant to the provisions of 28 USC, Sec. 2284. The final decree appealed from declared as unconstitutional Chapter 186, Session Laws of Alaska, 1968, also known as Sections 16.05.536, 16.05.540 and 16.05.250 of the Alaska Statutes, as amended by Ch. 186, Laws of Alaska 1968. The decree also declared unconstitutional Section 102.09 of the proposed 1969 Alaska Commercial Fishing Regulations and enjoined the named state officials from enforcing those regulations and the statute.

The Supreme Court has jurisdiction to review by direct appeal the judgment and decree complained of by the provisions of 28 USC, Sections 1253 and 2101(a).

The final decree appealed from was made and entered on March 20, 1968. Notice of appeal was filed in the United States District Court for the District of Alaska on April 3, 1969, within the thirty days required by 28 USC, Section 2101(a). The record was made up and the case filed with the Clerk of the United States Supreme Court on May 31, 1969, within sixty days after the appeal as required by 28 USC, Section 2101(a).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND RULES

Constitutional Provisions

United States Constitution

Sec. 1, Article XIV, amendments:

"... nor shall any state ... deny to any person within its jurisdiction the equal protection of the laws."

Alaska Constitution

Sec. 3, Article VIII:

"Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

Section 15, Article VIII:

"No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."

Statutes

Chapter 186, *Session Laws of Alaska*, 1968:

Be It Enacted By The Legislature of The State of Alaska:

*Section 1. LEGISLATIVE FINDINGS. (a) The legislature finds that excessive entry into Alaska fishing area has resulted in massive accumulations of salmon fishing gear with attendant ever-increasing difficulty in providing for sound conservation and management of the resource.

(b) The legislature further finds that the uninhibited issuance of gear licenses to anyone despite total lack of experience in the particular area has not only been the prime factor tending

toward accumulation of excessive gear but also has posed additional management, enforcement, and public safety problems through the lack of familiarity with regulations, waters, and procedures peculiar to the individual area.

(c) In view of the findings in (a) and (b) of this section, it is considered necessary by the legislature to impose experience requirements before issuance of salmon gear licenses to applicants.

*Sec. 2. AS 16.05 is amended by adding a new section to read:

Sec. 16.05.536. PERSONS ELIGIBLE FOR GEAR LICENSES. (a) Except in cases of extreme hardship as defined by the Board of Fish and Game, a salmon net gear license for a specific salmon registration area may be issued only to a person who

(1) has previously held a salmon net gear license for that specific salmon registration area; or

(2) has, for any three years, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(b) An applicant who claims that he is qualified for a gear license under (a)(2) of this section shall submit to the Department of Revenue

(1) an affidavit by the applicant stating that he purchased Alaska commercial fishing licenses for the required three years, and during those years, commercially fished in the specific salmon registration area; the specific years the applicant purchased commercial fishing licenses shall be named in the affidavit; and

(2) either affidavits from two persons holding currently valid gear licenses in the area where the applicant desires to fish stating that the applicant has fished the required time in that area, or for each of three years statements prepared by the applicant, subsequent to the effective date of this section, signed by employees of the Department of Fish and Game evidencing that the applicant did report in at a Department of Fish and Game office within the required area during the required three years.

(c) A person who makes a false statement in the affidavits required by (b)(1) and (2) of this section is guilty of a misdemeanor.

*Sec. 3. AS 16.05.540 is amended to read:

Sec. 16.05.540. LIMITATION ON ISSUANCE OF FISHING GEAR LICENSES. The fishing gear licenses mentioned in secs. 550-650 of this chapter shall be issued one to the applicant and only for the area in which the applicant qualifies under sec. 536 of this chapter. Each applicant shall personally operate or assist in the operation of the licensed fishing gear. Each applicant for the fishing gear licenses mentioned in secs. 570 and 580 of this chapter shall also personally own or lease the licensed fishing gear. The license is transferable as provided under sec. 670 of this chapter.

*Sec. 4. AS 16.05.250 is amended by adding a new subsection to read:

(12) establish additional qualifications relating to the eligibility requirements for gear licenses.

*Sec. 5. This Act becomes effective on January 1, 1969, unless all or any part of sec. 102.09 of

the 1968 Alaska Commercial Fishing Regulations is struck down by the courts, at which time this Act will become effective immediately.

Regulations

Proposed 1969 Commercial Fishing Regulations for State of Alaska, Sec. 102.09:

"Section 102.09. Salmon Net Gear Licenses.

(a) Persons eligible for salmon net gear licenses.

(1) Except in cases of extreme hardship as defined in Sec. 102.09(a)(2), a salmon net gear license for a specific salmon registration area may be issued only to a person who:

(A) has held in 1965 or subsequent years a salmon net gear license for that specific salmon registration area; or

(B) has, for any three years since January 1, 1960, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(2) Exceptions for extreme hardship:

Upon approval by a Hardship Panel consisting of the Commissioner, the Deputy Commissioner for Commercial Fisheries, and the Director of the Commercial Fisheries Division of the Department of Fish and Game, a salmon net gear license shall be issued as follows:

(A) Serious injury, sickness, or death; If the head of a household who held a 1968 Alaska salmon net gear license will be prevented from commercial fishing in 1969 because of serious injury, or sickness as certified by a physician, or death, a member of his family, or other individual selected by the family, shall be issued a 1969 salmon net gear license for the same registration area.

(B) Other cases of extreme hardship, including new fisheries, certain military service situations and prolonged illnesses as approved by the Hardship Panel.

A new fishery is a fishery that has developed in a new location where eligible fishermen are insufficient to adequately harvest the resource.

Rules

Federal Rules of Civil Procedure—Rule 56(c)

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a mat-

ter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

QUESTIONS PRESENTED FOR REVIEW

1. Does Ch. 186, SLA 1968 by itself or together with the proposed 1969 Alaska Commercial Fishing Regulations, Sec. 102.09 violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

2. Does Ch. 186, SLA 1968 by itself or together with the proposed 1969 Alaska Commercial Fishing Regulations, Sec. 102.09 violate either or both Sections 3 and 15, Article VIII, Constitution of the State of Alaska?

3. Did the District Court properly deny appellants' motion to dismiss or in the alternative to abate the action pending the determination of the Alaska Constitutional issues by the Alaska Court System?

4. Did the District Court properly grant appellees' motion for summary judgment in the light of the facts before it and the procedural and legal requirements of Federal Rules of Civil Procedure 56?

STATEMENT OF THE CASE

The Fifth Legislature of the State of Alaska, Second Session, passed in 1968 Ch. 186, Session Laws of Alaska, 1968. The text of the statute appears at pages

2-6, *supra*. In 1968 the Board of Fish and Game of the State of Alaska promulgated Sec. 102.09 of the 1968 Commercial Fishing Regulations relating to salmon net gear licenses. On July 5, 1968, appellees, non-residents of the State of Alaska, and previous holders of salmon net gear commercial licenses, filed their complaint herein. The complaint was based in large part upon the existence of Sec. 102.09, 1968 Commercial Fishing Regulations. Because of the lapse of time during the pendency of this action, a substantial portion of the matters alleged in appellees' complaint became moot and are not relevant to this appeal. On January 6, 1969, appellees moved to file an amended complaint. On February 14, 1969, the amended complaint was filed (A. 1). Insofar as pertinent to this appeal the amended complaint alleged that the appellees had applied for a 1968 license authorizing their operation of salmon net gear for commercial fishing in Alaskan waters and that the application for such licenses had been denied. Appellees alleged further that because of the operation of Ch. 186, Session Laws of Alaska 1968 and Sec. 102.09 of the 1969 Commercial Salmon Fishing Regulations of the State of Alaska, they could not qualify for Alaska salmon net gear licenses. Appellees further alleged that as a result of the statutory and regulatory provisions relative to the issuance of a State of Alaska commercial salmon net gear license, they were deprived of equal protection of the laws under Sec. 1, Article XIV of the Amendments to the Constitution of the United States of America, and further that they were denied rights guaranteed them by Article

VIII, Sec. 15 and Article VIII, Sec. 3 of the Constitution of the State of Alaska.

In support of matters alleged in the amended complaint and also in support of appellees' motion for summary judgment filed on December 2, 1968, Rudolph Plancich, one of the appellees, filed a supplemental affidavit on January 20, 1969 (A. 60). The supplemental affidavit of Rudolph Plancich stated that he was the owner of a purse seine fishing vessel representing an investment of approximately $45,000.00 and desired to obtain an Alaska commercial purse seine gear license for 1969 for use in Southeast Alaska. He was denied issuance of such license in 1968. The affidavit further stated that because of the application of Ch. 186, SLA 1968 and Sec. 102.09 of the Alaska 1969 Commercial Fishing Regulations, that he would not be eligible for issuance of a net gear license in Southeast Alaska in 1969. The affidavit stated also that as a result of affiant's inability to obtain a salmon gear license for fishing operations in the Southeast Alaska waters in 1969, he would suffer losses in the amount of $10,000.00 to $20,000.00 and that these losses would continue during each year he was denied the issuance of the license.

On September 16, 1968, appellants filed a motion to dismiss, or in the alternative, to stay the proceedings in the United States District Court pending the determination by the Alaska State Court System of the effect of Article VIII, Sections 3 and 15 of the Alaska State Constitution upon the issues of the case. The United States District Court set the time for

hearing on appellants' motion to dismiss, or in the alternative, to abate and on all other motions presently pending. The time for hearing was continued until February 14, 1969, at which time all motions then pending were heard by the Court.

On November 6, 1968, appellants filed a motion for summary judgment and suggestions of mootness (A. 29). The appellants urged that Sec. 102.09 of the 1968 Commercial Fishing Regulations of the State of Alaska were as of the date of the motion, November 6, 1968, of no further force and effect. The court ordered that the issue as to the legality and validity of the 1968 regulation was moot. The motion for summary judgment was based upon the fact that there was no actual controversy between the parties relative to the applicability or constitutionality of Ch. 186, SLA 1968. Appellants asserted that as of the date of the motion, appellees had not applied for and consequently had not been denied, salmon net gear licenses for 1969. Ch. 186, SLA 1968 governed the issuance of salmon net gear licenses only for 1969 and subsequent years. The issuance of the 1969 licenses was governed in part by regulations to be enacted by the Alaska State Board of Fish and Game subsequent to the date of the motion. The motion for summary judgment was supplemented by the affidavit of Augie Reetz, Commissioner of the Alaska Department of Fish and Game (A. 30), to the effect that none of the appellees had filed applications for issuance of 1969 commercial salmon net gear licenses for the State of Alaska and that the 1968 commercial salmon net gear fishing regulations for the State of Alaska were no longer in

force and effect. The affidavit further stated that the regulations of the Alaska Board of Fish and Game governing the issuance of 1969 commercial salmon net gear licenses had not yet been enacted.

On February 14, 1969, the matters raised in appellants' motion for summary judgment were heard. The decree filed March 20, 1969, denied appellants' motion for summary judgment, and denied appellants' motion to dismiss or abate (A. 78-79).

On December 2, 1968, appellees filed a motion for summary judgment (A. 32) on the basis that as a matter of law the statutory and regulatory provisions relative to the issuance of Alaska commercial salmon net gear fishing licenses deprived appellees, among other things, of equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States and rights granted by Article VIII, Secs. 3 and 15 of the Alaska Constitution. Appellees' motion for summary judgment was heard on February 14, 1969 and granted by the decree of the District Court filed March 20, 1969.

The decree of the Court filed March 20, 1969 (A. 78) ordered as follows:

1. That appellants' motion to dismiss and motion for summary judgment be and the same are denied.

2. Appellees' motion for summary judgment be and the same is hereby granted.

3. Ch. 186, Session Laws of Alaska 1968 and Sec. 102.09 of the 1968 Commercial Fishing Regulations are hereby declared to be unconstitutional under the

provisions of the United States Constitution and the Constitution of the State of Alaska.

4. That appellants, their successors in office and all persons acting as their agents, officers and servants or under their direction and authority be and they are permanently enjoined and restrained from taking any action to place into effect, continue in effect or otherwise invoke or enforce part 102.09 of the Alaska Salmon Commercial Fishing Regulations in the aforesaid Ch. 186, Session Laws of Alaska 1968, and from denying fishing gear licenses by reason of the authority thereof.

SUMMARY OF ARGUMENT

1. The statutory and regulatory provisions under attack in this action do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The classification of those persons who, under the provisions of Ch. 186, SLA 1968 immediately qualify for a salmon net gear license, and those who cannot immediately qualify is based on grounds which are relevant to the state's objectives of resource management and industrial safety. Also the classification is based upon a state of facts which could reasonably have been conceived by the legislature to justify the classification. The proposed regulations meet the same tests of constitutionality as are applicable to the statute.

2. An exclusive right of fishery has not been created in the salmon net gear fishery. The lower court erroneously concluded that there was no reasonable

basis for the requirement that a person who was licensed for three years as a commercial fisherman, and who engaged in the fishery could qualify for a net gear license. The court also erroneously concluded that entry into the fishery depended upon prospective applicant's ability to obtain employment by one already engaged as a salmon net gear fisherman. Since no exclusive right of fishery was created, the provisions of Article VIII, Sections 3 and 15 of the Alaska Constitution were not violated.

3. The District Court's determination of the merits of the case should have been postponed until the applicability of the Alaska Constitutional provisions could be determined by the Alaska Court System. The two grounds upon which abstention should be granted apply in this case. The entire case could be resolved by a determination of the state constitutional issues. Appellees have asserted that the entire statutory and regulatory framework must fall in the light of these provisions. When an issue may be resolved without resort to federal constitutional principles, abstention is appropriate. Also, the state constitutional provisions are unique and for this reason they should be interpreted as a matter of first impression initially by an Alaska court. The interpretation of the constitutional provisions for the first time by the United States District Court was an abuse of that court's discretion under the abstention doctrine.

4. The District Court granted summary judgment in favor of appellees and held the Alaska Statute and Regulations unconstitutional under the United States

and Alaska Constitutions. In granting that judgment the court relied heavily upon a fact not admitted and not properly in evidence before it. The fact relied upon was that a prospective salmon licensee who wishes to fish for salmon in any given year and then qualify for a net gear license must obtain employment by one who already possesses the right to fish under a salmon net gear license. Since the fact relied upon was so material to the court's conclusions, the judgment must be reversed and the necessary facts to support the statutory and regulatory provisions be shown at plenary proceedings.

ARGUMENT

I. NEITHER THE STATUTE NOR THE PROPOSED REGULATIONS UNDER ATTACK, WHETHER TAKEN SEPARATELY OR TAKEN AS A WHOLE, VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. Summary of the provisions of the statute and regulations under attack.

The State of Alaska is by Fish and Game regulation geographically divided into eleven salmon registration areas, 5 Alaska Administrative Code, 39.120 (d)(1) (A. 83). Also each salmon net fisherman must be properly licensed and registered in the salmon registration area of his choice, 5 AAC 39.110 (A. 81). Chapter 186, Session Laws of Alaska, 1968 (hereinafter referred to as Ch. 186, SLA 1968), provided that a salmon net gear license may be issued only to a person who meets certain qualifications. Those quali-

fications are either (1) that he has previously held a net gear license for that particular salmon registration area; or in the alternative, that he has, for any three years, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that registration area. Sec. 4, Ch. 186, SLA 1968 gave authority to the Alaska Board of Fish and Game to establish additional qualifications relating to the eligibility requirements for gear licenses.

Ch. 186, SLA 1968 contains legislative findings that

> "(a) . . . excessive entry into Alaska fishing areas have resulted in massive accumulations of salmon fishing gear with attendant ever-increasing difficulty in providing for sound conservation and management of the resource."

and

> "(b) . . . the uninhibited issuance of gear license to anyone despite total lack of experience in the particular area has not only been the prime factor tending toward accumulation of excessive gear but also has posed additional management, enforcement, and public safety problems through the lack of familiarity with regulations, waters, and procedures peculiar to the individual area."

The legislature found further:

> "(c) In view of the findings in (a) and (b) of this section, it is considered necessary by the legislature to impose experience requirements before the issuance of salmon gear licenses to applicants."

Pursuant to its authority granted by Section 4, Ch. 186, SLA 1968, the Alaska Board of Fish and Game

considered the establishment of additional qualifications relating to the eligibility for gear licenses. The additional qualifications would have limited the eligibility for a 1969 salmon net gear license to a person who either, (1) held in 1965 or subsequent years, a salmon net gear license for that specific salmon registration area; or, (2) in the alternative to a person who has, for any three years, since January 1, 1960, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area (proposed Section 102.09, 1969 Alaska Commercial Fishing Regulations) (A. 13-17). Those proposed regulations were never adopted by the Board of Fish and Game.

B. Ch. 186, SLA 1968 is permissible state regulation under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Appellees have attacked Ch. 186, SLA 1968 on the ground that it denies equal protection of the law to those persons who are not included within that class of persons eligible for a salmon net gear license. On the other hand appellants assert that the limitations and requirements imposed by the legislature are the products of a valid exercise of state regulatory power. A consideration of the decisions of this court relative to the exercise of state regulatory power in the light of the Equal Protection Clause of the United States Constitution will make the correctness of appellants' position clear.

McGowan v. Maryland, 366 U.S. 420 (1961) is one of the latest opinions wherein this court has consid-

ered the application of the Equal Protection Clause to state regulation of economic activity. In *McGowan* the issue was whether a Maryland statute which, with certain exceptions, prohibited all labor, business and commercial activity on Sunday was constitutional. Exempted from the statute was the sale of items of bathing apparel, dance hall and amusement park activities and certain other activities conducted within specific localities within the state. One ground of constitutional attack was that the statute violated the Equal Protection Clause of the Fourteenth Amendment. This court stated the applicable principle:

> "Although no precise formula has been developed, the Court has held that 'the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (366 U.S. at pages 425-426)

In *McGowan* this court recognized that even though some inequality may result from a legislative classification, the legislature is presumed to have acted within its constitutional authority. Thus, while it may be true, that because of the provisions of Ch. 186, SLA 1968 some aspirants to a salmon net gear license may

not be immediately entitled to it, there exists the presumption in favor of the constitutionality of the legislative act.

Moreover, the constitutionality of the legislative act is supported by much more than this presumption when the two criteria of *McGowan* are considered. (1) That the creation of the classification must rest on grounds relevant to the state's objectives; and (2) that a legislative classification is not arbitrary if any state of facts can be reasonably conceived to justify the classification. The two tests of *McGowan* must be considered in the context of the resource, salmon, and the industry, salmon fishing, which the statute is intended to govern.

The statute under attack must have been enacted by the legislature with some awareness of the nature of salmon and the nature of salmon fishing. The family *Salmonidae* is native to the North Temperate Zone and is largely limited to the North Pacific rim. The Pacific salmon breeds (spawns) in fresh water, hatches from its eggs in fresh water, and depending upon the species, either remains in fresh water for a year, or swims directly to the sea. All salmon eventually travel to the ocean to feed until maturity. In the sea they spend varying amounts of time, up to five years, then early in the summer of their last year they return to the same stream in which they hatched to spawn, thus starting anew the life cycle. *Salmon, The Living Resource,* Fisheries Association of B. C. (and others), Agency Press, Limited (Canada), p. 9. Salmon migrate from the ocean in mass movements,

known as runs. The timing of the run depends on the species, and water conditions, *Ibid.*, at 10.

One objective of modern salmon management is to allow sufficient salmon to escape to the spawning grounds in order that the population may be maintained at an optimum level. *Ibid.*, at 17. The relationship between salmon net gear and escapement can be made clear by describing the typical salmon net gear and its operation. The two types of net typically used from salmon fishing vessels are (1) purse seines; and (2) gill nets. A purse seine is a net rigged with floats and weights which is let out and then closed in a circle enclosing all the salmon within it. A "purse line" at the bottom of the net is closed to prevent the salmon from escaping. The entrapped fish are then placed on the vessel by a variety of means. Washington State Department of Fisheries, *Pacific Northwest Marine Fishes,* at page 10 (1967). The amount of the possible catch of fish will vary with the length of the net and the depth of the net. J. Garner, *How to Make and Set Nets,* at page 69 (1962). A gill net also varies as to length and depth. The mesh of a gill net is of a size which permits a salmon to put its head, but not its body, through the net. When it attempts to back out, its gills are caught in the net. Floats hold the top of the net and weights hold the bottom so that it is practically vertical. Washington State Department of Fisheries, *Pacific Northwest Marine Fishes,* at page 10 (1967).

One other method which may be used for commercial salmon fishing from a vessel is trolling. This does

not involve net gear, but consists of dragging lines through the water at slow speeds. The fish are caught on baited hooks. This method is less efficient, generally, than those methods employing salmon net gear. Washington State Department of Fisheries, *Pacific Northwest Marine Fishes,* at pages 10-11 (1967).

The relationship between the amount of net gear and escapement is clear. If sufficient gear is employed, most of an entire run may be taken. If the amount of possible gear may be reduced, then the likelihood of such a taking of salmon is reduced. The need for escapement of a sufficient portion of each run is necessary since each run may vary biologically from every other. Assuming that varying racial characteristics are desirable, then escapement from each run is desirable, University of Washington, Publications in Fisheries, New Series, Vol. II, No. 1, *Salmon Gear Limitations in Northern Washington Waters,* at pages 18-19 (1963). The relationship between net gear limitation and management is stated at pages 35 and 36 of the above cited University of Washington study:

> "Totally aside from any economic gains, gear limitation can provide definite benefits to the conservation of the resource and at the same time provide more fish to the fishermen.
>
> During moderate-sized runs with the present level of gear, fishing must be curtailed to as little as two days per week in order to allow the necessary escapement. Short fishing periods with very high fishing intensities can result in alternate over-fishing and under-fishing of a series of races that pass rapidly through the fishery. The return from this kind of regulation can result

in numbers of progeny below the reproductive capacity of the parent stocks.

Short fishing periods hinder the management agencies in their task of getting information on the status of the runs. The result of regulation with insufficient information can result in management decisions more conservative than needed or, on the other hand, decisions that reduce needed escapement."

Although the above quoted study applies to the Puget Sound Fishery, its conclusions as to the effect of over accumulation of net gear apply to Alaska.

With the background described above, the statute under attack easily meets the two tests of *McGowan* described on page 19, *supra*. First, the creation of a class of those who are presently entitled to a salmon net gear license as distinguished from those who must perform some further act in order to be entitled to such a license rests on grounds which are relevant to the achievement of the state's objectives. The state's objectives, as described by the legislative findings may be enumerated as follows:

1. To reduce the amount of salmon gear in Alaska fishing areas in order to aid in the conservation and management of the resource.

2. To increase public safety in Alaska fishing areas by increasing a fisherman's knowledge of the regulations, waters and fishing procedures in each salmon registration area. The statutory classification is relevant to the state's objectives. First, the limitation of a salmon net gear license to either (1) those persons

who have previously held a salmon net gear license for a particular salmon area; or (2) those who have while licensed as a commercial fisherman fished in that specific area for three years, will tend to limit the entry of licensees into Alaska salmon fishing areas. This limitation must necessarily follow since prior to the legislation no restrictions on net gear licensees were imposed except for the payment of a license fee. As shown above at page 21 with fewer net gear licensees in a salmon registration area, the objective of conservation and management of the resource will be aided. With fewer net gear fisherman, it is likely that fewer fish will be taken.

Also, by requiring that in order to be licensed for a particular area, a licensee must either have been licensed there before, or must have commercially fished the area for three years, the legislature is achieving the objective that the licensee be familiar with the area and familiar with the regulations applicable to the area. It must necessarily follow that in salmon net gear fishing, as with any other undertaking, familiarity with the area of work and the regulations and procedures incident to that work will most likely result in a safer operation and one more free from violations of any applicable regulations. Once again the state's objective is accomplished.

Secondly, *McGowan* also stands for the proposition that a distinction in legislation should not be set aside and is not arbitrary, if any state of facts can reasonably be conceived to justify the distinction. See also *New York Rapid Transit Co. v. New York,* 303 U.S.

573 (1938). The statute under attack must have been enacted by the legislature with some awareness of the above described methods and means employed in commercial salmon gear fishing. In addition to those methods and means, the legislature was aware of the fact that in order to harvest an optimum amount of the resource, and at the same time provide for escapement, the Department of Fish and Game opens and closes the areas surrounding the mouths of spawning streams by emergency order during the seasons. These orders are usually made by radio announcement. Also most streams are closed within a certain area outside their mouths, and even entire bays, inlets and estuaries may be closed to commercial salmon fishing. The closures are usually indicated by markers, either on shore, or by buoy or both.

It is also well known that commercial salmon net gear fishing must of necessity be carried out upon the open sea and channels. Any enterprise located upon the open sea and channels, especially in Alaska, is affected by weather, which in turn affects the character of the sea upon which the activity is pursued. Furthermore, the bottom characteristics of that sea vary from place to place, and even from time to time, depending upon the tide, wave action and other factors.

With this background the legislature could have reasonably conceived all or any part of the following state of facts:

1. In 1968 there was such an accumulation of salmon net gear in the State of Alaska that the

salmon resource was threatened due to overharvest and lack of escapement.

2. That there is a direct correlation between the amount of salmon net gear and the amount of harvest.

3. That by 1968 many licensees were acquiring salmon net gear licenses who had no previous experience in the industry, and that the lack of experience was particularly felt in the following fields:

a. Unfamiliarity with the basic marine characteristics of the area within which licensees desider to fish including tidal action, bottom characteristics and effect of weather.

b. Unfamiliarity of licensees with the particular closure devices and markers used by the Alaska Department of Fish and Game for the purpose of marking stream mouths and for closing a local area completely.

c. Unfamiliarity with the Methods and Means used in safely pursuing commercial salmon gear fishing.

d. Unfamiliarity with regulations pertaining to a commercial salmon net gear fishing.

On the basis of its foregoing reasonable assumptions, the legislature could reasonably deduce the following:

1. That a person who has previously held a salmon net gear license in a particular area most likely will be sufficiently familiar with the areas of legislative concern so as to be entitled to further licensing.

2. That a person who has actively engaged in commercial fishing in a particular area while licensed as a fisherman for three years will have become sufficiently familiar with the area of legislative concern so as to be entitled to further licensing.

This court has recognized that a legislative classification of the type here under attack meets the requirements of the Equal Protection Clause. In *Kotch v. Board of River Pilot Commissioners for the Port of New Orleans,* 330 U.S. 552 (1947) this court held constitutional a Louisiana statute providing for the licensing of pilots for the Port of New Orleans. The particular statute required all seagoing vessels between New Orleans and foreign ports be navigated exclusively through the approaches to the port of New Orleans by State Officers licensed as pilots. Only those persons who had served a six month apprenticeship under active pilots could be certified to the governor for appointment. Appellants in the *Kotch* case had had at least 15 years experience as pilots elsewhere, but had not served the required six months apprenticeship in New Orleans. It had also been shown that by and large only relatives and friends of incumbent pilots had ever been selected as apprentices. The court observed that the constitutional requirements of equal protection might be offended if the classification rested on a basis not at all related to achieving the state's objective. As an example the court indicated that if the licensing qualification depended upon race, religion or any other basis not at all related to the regulated activities, the qualifica-

tions would be invalid. See *Yick Wo v. Hopkins,* 118 U.S. 356 (1886) where a person was denied the right to engage in the laundry business because of the peculiar application of the act in question to Chinese laundries. There was no relationship between one's being Chinese and the operation of a laundry which could justify the classification.

In upholding the statute in *Kotch* this court recognized that

> "In order to avoid invisible hazards, vessels approaching and leaving ports must be conducted from and to open waters by persons intimately familiar with the local waters." (330 U.S. at page 558)

In the case at hand the Alaska legislature has determined that familiarity with local fishing areas is a necessary objective to insure safety and ease of enforcement.

Moreover the statute here under attack is much more liberal than that under attack in *Kotch.* The application of the statute in *Kotch,* had in fact created a closed class, in that only those persons related or friends of the existing pilots could become apprenticed. The Alaska statute clearly allows anyone to become a salmon net gear licensee if he fishes, on his own, commercially for three years. Thus, unike *Kotch,* the licensee holds the key to the license in his own hand. He may gain entrance, under that set of circumstances, after three years.

Two other decisions of the United States Supreme Court round out the requirements relative to consti-

tutionality of Ch. 186, SLA 1968 under the Equal Protection Clause. *Morey v. Doud,* 354 U.S. 457 (1959) involved the constitutionality of Illinois statute regulating currency exchanges. All currency exchanges except the American Express Company were prohibited from doing certain acts. In holding the statute unconstitutional this Court found that a closed class was created and that the closure was not related to the legislative objective. The Court in *Morey* quoted with approval from *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 (1911), the following criteria for determining whether a classification is valid:

> " '1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequity. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. [Case cited.]
>
> To these rules we add the caution that 'Discriminations of an unusual character especially suggest careful consideration to determine whether

they are obnoxious to the constitutional provision.'" (354 U.S. at pages 463-464.)

Applying the criteria of *Morey* to the case at bar we find the following: 1. The classification is not purely arbitrary. The classification of eligible licensees into those who (1) have had a salmon net gear license for a particular area, or (2) those who have had a commercial fishing license in a particular area is reasonably suited to remedy some of the problems found by the legislature. The classification promotes the accumulation of less gear and insures that applicants have a basic minimum of experience by requiring that an applicant must have been licensed for net gear previously or that he must have fished the area commercially.

2. *Morey* recognized that the classification need not be devised with mathematical nicety. It might be shown that some of those who have previously held net gear licenses in a particular area are not in fact as knowledgeable as the legislature would desire. However, the probabilities are in favor of such a licensee having the sought after experience and the required knowledge. Also it might be shown that some licensees could become familiar with the particular area only after one or two years of commercial fishing. However, on the other hand it might be shown that some licensees would require four or five years to achieve the necessary familiarity. Although not mathematically exact, the three year commercial fishing requirement is reasonable to achieve the legislative objective.

3. It has earlier been shown that the classification rests on a state of facts which the legislature could reasonably conceive to support it, *supra* pages 24-25.

4. The burden rests on appellees to show the essential arbitrariness of the legislative classification. The affidavit of Rudolph Plancich merely shows that he is a commercial salmon fisherman who has invested considerable time and money in his profession. It fails to demonstrate the arbitrariness of the statute. Appellees may argue that since their interrogatories are directed to matters upon which the legislature made findings, and since the Department of Fish and Game has not compiled data of the type requested by appellees, the legislative findings are of no effect. Appellees' position is not well taken. The interrogatories were directed to the appellants who in turn are the Commissioner and the Board of Fish and Game for the State of Alaska. The fact that the appellants have not made an analysis of their records in the detail which would satisfy appellees, or even do not possess the type of record which would satisfy them, does not detract from the basis upon which the legislature made its findings. The legislature, a separate branch of government, is not bound by the knowledge of the executive, and may consider matters not within the knowledge of the executive. Thus the answers to appellees' interrogatories do not aid the appellees in meeting the burden upon them to show the essential arbitrariness of the classification.

5. The classification here involved is not unusual in the sense that the classification in *Morey* is un-

usual. The class for eligible applicants remains open, and those admitted to the class are not specific individuals, but any person meeting the requirements. It is useful, therefore, to consider what is required in order to obtain a commercial fishing license in Alaska. The issuance of a commercial fishing license is governed by AS 16.05.540, (A. 18), providing that such a license is a prerequisite to commercial fishing and may be obtained by payment of a $10.00 fee by residents and a $30.00 fee for non-residents. The regulatory provisions impose no other requirements upon the issuance of a commercial fishing license. With such a license one may engage in any type of commercial fishing in Alaska, except salmon net gear fishing. This would include, among others, trolling for salmon, halibut fishing, and working aboard a licensed salmon net gear vessel.

This court has also established the criteria that the discrimination must be "invidious" to fall within the prohibition of the Equal Protection Clause. In *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955) the court was interpreting an Oklahoma statute regulating the prescription, preparation and fitting of eyeglasses. The statute excluded from regulation certain ready to wear glasses, sunglasses and industrial glasses. The court, in holding the statute constitutional stated that "[T]he prohibition of the Equal Protection Clause goes no further than the invidious discrimination." (348 U.S. at page 489). It cannot be stated that the classification by which certain persons are excluded from the class eligible to

obtain salmon net gear licenses is invidious especially when the class is not closed, but remains open to those who will attempt to qualify. See also *Corsa v. Tawes*, 149 F.Supp. 771 (D.C., Md., 1957) in which a statute limiting the use of purse nets in Maryland tidal waters excluded non-residents and seriously limited the commercial fishery. The District Court for the District of Maryland stated in holding the statute valid:

> "While in the exercise of this power the State is not immune from recognized constitutional limitations, it is to be remembered that in the field of conservation, as in other, courts will not strike down legislative enactments as violative of due process unless the means chosen has no reasonable relation to the objective sought to be accomplished." (149 F.Supp. at page 773)

Even though *Corsa v. Tawes* spoke in terms of due process, the same may be said when the attack is based upon a denial of equal protection of the laws. The State of Alaska has a valuable resource, its salmon, to conserve and protect. The means it has employed is reasonable and the statute should be upheld.

C. The proposed regulation, Sec. 102.09 of the 1969 Commercial Fishing Regulations, is permissible State regulation under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The foregoing discussion has related only to the statutory provision, Ch. 186, SLA 1968. The lower court failed to isolate the statute from the proposed 1969 Commercial Fishing Regulations. The opinion was directed to the "licensing scheme" in its entirety, including the proposed regulations. Since, however,

the statute is complete on its own, and may be effective without additional regulations the appellants urge that this court consider the constitutionality of the statute and of the proposed regulations separately. This approach is imperative, since, in fact the proposed regulations with which the lower court concerned itself had not been adopted as of the dates of the opinion and decree have not yet been adopted.

Notwithstanding the above comments, appellants assert the proposed regulations, had they been adopted by the Alaska Board of Fish and Game are constitutional. The statute under attack, Ch. 186 SLA 1968, contained an amendment to AS 16.05.250 allowing the Alaska Board of Fish and Game to "establish additional qualifications relating to the eligibility requirements for gear licenses." Pursuant to the authority granted by that amendment regulations were prepared which would restrict the issuance of a salmon net gear license to a person who

> "(A) has held in 1965 or subsequent years a salmon net gear license for that specific salmon regulation area; or
>
> "(B) has for any three years since January 1, 1960, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area."
>
> (Proposed 1969 Alaska Commercial Fishing Regulations, Sec. 102.09)

It was asserted by appellees and held by the District Court that these regulations together with the statute violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The same principles apply in respect to determining the constitutionality of a regulation as in the case of a statute, *Robinson v. Stcte of Florida,* 378 U.S. 153 (1964). Thus the test of the reasonableness of the regulation in the light of any state of facts which could reasonably be conceived, applies. In the case of these regulations the following facts may reasonably have been assumed and considered by the Board of Fish and Game in adopting the regulations:

1. That a person holding a salmon net gear license prior to 1965, but who did not hold such a license in 1965 or in subsequent years does not possess sufficient knowledge, experience and familiarity with the specific salmon regulations. As in any type of endeavor, the methods and means of undertaking commercial net gear fishing vary as time progresses. Regulations and procedures change, and bottom and estuary characteristics in local areas change due to tidal and wave action. Thus even though not delineated with mathematical certainty, the Board of Fish and Game could reasonably conclude that anyone who had not held a salmon net gear license since 1965, did not possess the required knowledge.

2. That a person who has not held a commercial fishing license for any three years since 1960 does not possess the type of knowledge set forth in the preceding paragraph. Also, since a person, in order to qualify for a gear license under the commercial licensing provisions, must hold a commercial license for three years, it is reasonable to consider as eligible, persons who were licensed in earlier years than those per-

mitted for licensee qualifying under the (A) section. More years of licensure are required, hence the likelihood of someone qualifying on the basis of at least one year after 1965 is great.

Also for the reasons shown above, the classification by regulation is not arbitrary or invidious.

II. NEITHER THE STATUTE NOR THE PROPOSED REGULATIONS UNDER ATTACK, WHETHER TAKEN SEPARATELY OR TAKEN AS A WHOLE, VIOLATE ARTICLE VIII, SECTION 15 OF THE ALASKA CONSTITUTION (PROHIBITING AN EXCLUSIVE RIGHT OF FISHERY) OR ARTICLE VIII, SECTION 3 OF THE ALASKA CONSTITUTION (RESERVATION OF FISH AND WILDLIFE TO THE PEOPLE FOR COMMON USE).

Article VIII of the Alaska Constitution provides in part as follows:

> "Section 3. *Common Use.* Whenever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."
>
> "Section 15. *No Exclusive Right of Fishery.* No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."

A. Ch. 186, SLA 1968 is valid under the quoted provisions of the Alaska Constitution.

Since the District Court dealt more extensively with the applicability of Section 15, that section will be considered first and more extensively.

Article VIII, Section 15 is based upon the White Act of June 18, 1926, 44 Stat. 752, a Federal Act, which applied to Alaska fisheries. The Act gave the

Secretary of the Interior administrative control over Alaska fisheries and the authority to make such regulations concerning those fisheries as he deemed advisable. The Act, in pertinent part provided that:

> ". . . no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce."

The leading case involving the construction of the White Act is *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949). The Secretary of the Interior delegated exclusive use and control of a particular salmon spawning stream on Kodiak Island to a specific Indian tribe. The United States Supreme Court held that the Secretary's delegation of exclusive use was in violation of the White Act. The court concluded that the result of the administrative action was to delegate all future control over the fishery to the Indian tribe and their assignees. The regulation prohibited commercial salmon fishing in the general area of the Karluk Indian Reservation of Kodiak Island, except that

> "The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives." (50 CFR 1946 Supp. Sec. 208.23)

The Supreme Court determined that a special privilege in and to Alaska fishing preserves had been granted.

On the basis of the *Hynes* case the District Court in this case found that the statute and regulations here involved granted an exclusive right of fishery. The District Court relied on an opinion of the Alaska Attorney General dated February 9, 1969. The Attorney General's Opinion dealt with a proposed Commercial fishing regulation which would limit the issuance of salmon net gear licenses to only those persons who obtained such licenses in 1966 or 1967 (A. 38). The opinion specifically noted that licenses could only be issued to those who obtained gear licenses in 1966 or 1968 (sic 1967). The present statute, Ch. 186, SLA 1968 creates a much broader class than the regulation disapproved by the Attorney General. What was a narrow closed class became an open ended class by virtue of the provisions of the 1968 regulations allowing new entry by public drawing (Exhibit "A" to Complaint filed July 5, 1968). The distinction was recognized and approved by the Attorney General when by letter dated February 16, 1968 he approved proposed Section 102.09 of the 1968 Commercial Fishing Regulation (A. 52). The provisions for new entry under the provisions here under attack are broader than those approved by the Attorney General.

Appellees urged and the District Court found that only those who were permitted by the present class of salmon net gear licensees could obtain the sought after license. (See pages 48-49, *infra,* for a discussion of appellants' contention that the District Court's finding in that respect was not supported by the evidence.) The Court stated:

> "The fact that he might do so [obtain a commercial license], even though he could never, without the aid of an established net-gear licensee, have previously gained experience in an area with gear essential to salmon fishery does not harmonize with defendants' argument that the challenged scheme is designed to promote safe operation by experienced fishermen." (A. 75)

The District Court thus summarily disregarded the means whereby new entrants could enter the class of salmon net gear licensees by stating that the entry by commercial fishing licensees did not harmonize with the state's objective of increased safety and knowledge. In so doing, the court disregarded the fact that many aspects of fishing safety are common to all phases of the trade. Salmon net gear fishing may, however, impose additional safety requirements and additional knowledge of technique. The legislature therefore was seeking that the prospective licensee be well versed in the basic knowledge required of all fishermen before he be allowed a salmon net gear license. This court has held that a statute need only address itself to that particular phase of a problem which to the legislative mind seems most acute, and that all phases of a problem need not be dealt with at one time, *Williamson v. Lee Optical of Oklahoma, supra,* pages 31-32. Thus the legislature need only assure itself that aspiring salmon net gear licensees have a basic understanding of technique. For this reason the District Court's finding that there was no purpose to the legislation is clearly erroneous. The District Court's reliance on the *Hynes* case and the Attorney Gener-

al's Opinion of February 9, 1968 are for the same reason misplaced. It is useful to note that the Supreme Court of the United States in the *Hynes* case recognized that wide discretion must be vested in those who are responsible for the control of Alaska's fisheries. The Court quoted with approval an extract from the legislative history of the White Act:

> "The waters of Alaska are so vast and the local conditions so varied that it is utterly impossible to prescribe by legislation in detail the provisions necessary to meet each situation. To attempt to do so would be to defeat the purpose sought. This can be done by placing broad powers and a wide discretion in the administrative branch having charge of the subject." (337 U.S. at page 121)

The statute under attack seeks to provide the framework within which the Department of Fish and Game may overcome problems posed by the vastness of Alaska's waters and the variance in local conditions. In seeking to achieve this result, an exclusive right of fishery has not been created.

The District Court did not deal separately with the provisions of Art. VIII, Section 3 of the Alaska Constitution which reserves wildlife and fish for the common use of the people. Thus, what has been stated above in respect to the creation of an exclusive right of fishery applies equally to the common use provision.

B. The Proposed Regulations are Valid under the above quoted provisions of the Alaska Constitution.

As in the case of the application of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States to the statutes and regulations, the District Court failed to deal separately with the statute and the proposed regulations under the relevant Alaska Constitutional provisions. The statute can and does stand on its own and for this reason appellants urge that this court consider the constitutionality of the statute and the proposed regulations separately.

The same comments regarding the constitutionality of the proposed regulations under the Fourteenth Amendment are applicable to their constitutionality under the common use and exclusive right of fishing provisions of the Alaska Constitution. The proposed regulations have made it possible for anyone to obtain a salmon net gear license if they have fished commercially for three years after 1960 or have been licensed as a net gear licensee for any year from 1965 on. There is no exclusive right of fishery created.

III. THE PROCEEDINGS ON THE MERITS OF THE CASE SHOULD HAVE BEEN STAYED OR ABATED BY THE DISTRICT COURT PENDING THE DETERMINATION BY AN ALASKA COURT OF THE EFFECT OF ARTICLE VIII, SECTIONS 3 AND 15, ALASKA CONSTITUTION UPON THE STATUTES AND REGULATIONS HERE INVOLVED.

Appellees asserted in their complaint and amended complaint that the statute and regulations under attack violated Article VIII, Sections 3 and 15 of the

Alaska Constitution. Those provisions are set out at page 3, *supra*. On September 16, 1968, appellants filed a motion to dismiss appellees' action, or in the alternative to stay the proceedings in the United States District Court pending the determination of the Alaska Constitutional question by an Alaskan court (A. 28). Appellants' motion to dismiss or abate was denied (A. 78). Appellants assert that the District Court committed error by that denial.

Appellants do not dispute the fact that the United States District Court had jurisdiction under 28 USC Sec. 1331(a). The issues raised by appellees presented a substantial federal question under the Fourteenth Amendment to the United States Constitution. However, appellees asserted also that the statute and regulations violated the Alaska Constitution. On that ground appellants moved that the District Court, in the exercise of its discretion, withhold relief or dismiss the action pending the determination of the state constitutional issues by an Alaskan court.

The Federal doctrine of abstention which is clearly applicable to this case had its origin in *Railroad Commission of Texas v. Pullman Company,* 312 U.S. 496 (1941). That case involved an action to enjoin enforcement of a rule of the Texas Railroad Commission requiring all Pullman cars to be in charge of a Pullman conductor. The rule was alleged to be in violation of state law in that the commission had no authority to enact such a regulation. The action was remanded to the federal district court with directions to retain jurisdiction pending a determination of issues involving state law in the state court. This Court stated:

"The lower [federal district] court did deny that the Texas statutes sustained the commission's assertion of power. And this represents the view of an able and experienced circuit judge of the circuit which includes Texas and of two capable district judges trained in Texas law. Had we or they no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law. But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by state adjudication. The reign of law is hardly promoted if an unnecessary ruling of federal court is thus supplanted by a controlling decision of a state court. . . .

Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, . . . or the final authority of a state court to interpret doubtful regulatory laws of the state." (312 U.S. at pages 500-501)

The doctrine of arbitration established in the *Pullman* case rests on two sound policy considerations. First, the Federal constitutional issue should not be determined if the case can be determined on other

grounds, and second, state courts should have the first opportunity to interpret state laws and regulations. Both of these considerations apply with vigor to the present case. The state constitutional issues raised by the complaint and amended complaint encompass the entire statutory and regulatory framework. The entire litigation could possibly have been resolved at the state court level without the necessity of determining the Federal constitutional issue. The second consideration is even more applicable and important. Article VIII, Sections 3 and 15 of the Alaska Constitution has never, as such, been interpreted by any court. The provisions of Section 15 are uncommon in other constitutions, the only other states with provisions remotely similar are California (Article I, Section 25), Hawaii (Article X, Section 3), Rhode Island (Article IV, Section 90), and Vermont (Article II, Section 53). The constitutional provision relates to an asset unique in its abundance in Alaska, its fish resource. The statute and regulations relate to the same unique resource, the management of which is a matter of great state concern. The first judicial application of these constitutional provisions properly should be by an Alaska Court.

In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) the Supreme Court recognized that the validity under state law of orders of state regulatory agencies affecting the conservation of a basic resource should be decided by state courts. The order attacked in *Burford* was one of the Texas Railroad Commission granting

a permit to drill four wells in the East Texas Field. The order was attacked both on State and Federal grounds. The Supreme Court observed that the problem of conservation of oil and gas in Texas is "an aspect of 'as thorny a problem or had challenged the ingenuity and wisdom of legislatures'" (319 U.S. at page 318). The problem of regulation of and conservation of the Alaska salmon resource is equally as thorny a problem. The Supreme Court in *Burford* recognized the confusion caused by federal court interpretation of the applicable state law (319 U.S. at page 329) and affirmed the District Court's dismissal of the complaint. The Court stated:

> "These questions of regulation of the industry by the State administrative agency, . . . so clearly involve basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them." (319 U.S. at page 332)

The policy upon which the applicable Alaska state constitutional provisions here involved is based is likewise so uniquely applicable to the State of Alaska that the first consideration of the applicability of those provisions to the statute and regulations should be by an Alaska Court. It is important that the Supreme Court in *Burford* did not order abstention, as it did in the *Pullman* case but ordered the case dismissed.

The significance of the doctrine of abstention to the relationship between the state and federal courts is made clear in *Alabama Public Service Commission v.*

Southern Railway Co., 341 U.S. 341 (1951). That case was one wherein the Alabama Public Service Commission denied the Railway Company the right to discontinue certain trains. The Railway Company had a right to appeal this administrative decision to the Alabama State Courts but elected instead to file a complaint in the United States District Court basing jurisdiction on diversity of citizenship and federal question. The United States District Court enjoined the Public Service Commission from enforcing its order. The U.S. Supreme Court reversed the judgment of the District Court. The Supreme Court stated:

> "Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts', is convinced that the asserted federal right cannot be preserved except by the granting of the 'extraordinary relief of an injunction' in the federal courts." (341 U.S. at pp. 349-350)

The significance of the decision in the *Southern Railway* case lies in the fact that the Supreme Court recognized that there was no individual state law involved requiring definitive construction. The Court considered that abstention was appropriate when questions of domestic policy were concerned:

> "It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the statutes." (341 U.S. at page 351)

Similarly in this case the District Court should have withheld relief so as to allow the basic question of domestic policy, raised by the constitutional provisions to be decided by an Alaska Court.

City of Meridian v. Southern Bell Telephone & Telegraph Company, 358 U.S. 639 (1959) was before the United States Supreme Court in a context almost identical with the case at bar. A Mississippi statute imposing a charge on public utilities for using public streets was attacked as violating the Federal and State constitutions. The District Court entered a judgment declaring the statute in conflict with the State and Federal constitutions. That judgment was affirmed by the Court of Appeals for the Fifth Circuit. The Supreme Court remanded the case to the District Court with directions to hold it pending a determination of applicable state law by a state court. Thus in *Meridian,* as here, the District Court found the statute in question violative of both state and federal constitutional provisions. In *Meridian,* as here, there was no argument that the state constitutional provisions were ambiguous or needed judicial clarification. The issue, simply stated, was which court should decide state constitutional issues first. The *Meridian* case clearly holds that a state court should:

> "Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunal preliminary to a federal court's consideration of the underlying federal constitutional question." (358 U.S. at page 641)

The reason for this is sound:

> "In such a case, when the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the federal constitution, the federal court should hold its hand less it render a constitutional decision unnecessarily." (358 U.S. at page 641)

See also *Clay v. Sun Insurance Office,* 363 U.S. 207 (1960). No clearer authority is necessary to point out the District Court's error in failing to allow the proper Alaska Court to decide the state constitutional issues.

An exception to the doctrine of abstention not applicable to the case at bar is found where it is alleged that a state statute or regulation may abridge fundamental civil liberties. Typical of such cases are those involving religious liberties and freedom of speech, *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943), school segregation; *Romero v. Weakley,* 226 F.2d 399 (9th Cir. 1955) and freedom of speech; *Zwickler v. Koota,* 389 U.S. 241 (1968); *Baggett v. Bullitt,* 377 U.S. 360 (1964) and *Dombrowski v. Pfister,* 380 U.S. 479 (1965).

The present case is clearly distinguishable from those applying the exception. Hence, this Court should, if it does not rule on the merits favorable to appellants as to parts I and II hereof, remand this case to the Federal District Court, or dismiss the case, pending the determination of an Alaska Court of Alaska constitutional issues.

IV. APPELLEES' MOTION FOR SUMMARY JUDGMENT WAS NOT PROPERLY GRANTED IN THAT THE COURT ASSUMED FACTS NOT PROPERLY BEFORE IT.

A. The District Court, in granting appellees' motion for summary judgment assumed facts not properly before it.

Federal Rule of Civil Procedure 56(c) states when the granting of summary judgment is proper:

> "The judgment sought shall be rendered forthwith if the pleading, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law."

Part I of this brief is directed to appellants' assertion that appellees were not entitled to judgment as a matter of law. This portion of the brief is limited to the narrow issue that the court assumed a fact not properly in evidence, either by any affidavit, answer to interrogatories, or pleading in support of its decree granting summary judgment to appellees. The court stated:

> "Thus, if an outsider wishes to fish for salmon in a given year, and in three years to qualify for his own gear license, his chances are wholly dependent upon obtaining employment under a member of that closed class of fishermen who, in the specified past years, possessed the right to fish the area." (A. 70-71)

There is nothing in the record to support the above quoted conclusion of the court. The court disregarded the fact that in order to fish for salmon under a commercial license one may fish without gear. Trolling for

three years would also qualify an individual for a gear license.

The court also stated:

> "Under the scheme, entry into the salmon industry is controlled not by the state, but by local fishermen in each area who are eligible for gear licenses and can choose among the commercial fishermen, if any, that they might wish to hire." (A. 71)

That statement is not supported in the record. In effect the court is stating the statute is unconstitutional in its application. However, there is nothing by any admissions in the pleadings, affidavits, answers to interrogatories or otherwise to support this conclusion. The statutes themselves refute it by allowing a licensee to acquire a salmon net gear license after three years of active commercial fishing. The relevant Alaska statutes pose no requirement for obtaining a commercial license, save the payment of a nominal fee, AS 16.05.480.

Since an analysis of the District Court's opinion compels the conclusion that its decision was based upon the erroneous assumption of facts noted above, that decision should not stand and must be reversed.

B. The court, if appellants were not entitled to judgment as a matter of law, should have denied appellees' motion for summary judgment and determined the merits at a plenary proceeding.

Appellants have urged in Part I of this brief that the statute and the regulations are not unconstitutional on their face. For that reason summary judg-

ment was improperly granted in favor of appellees. Therefore, as to the issue of whether appellees' motion for summary judgment should have been granted there was no dispute as to a material issue of fact. Hence, the statement of genuine issues required by Rule 5(H)(2) (A. 76 Fa.5) of the Rules of the District Court for the District of Alaska was not filed. There were no genuine issues, relative to appellees' motion, necessary to be litigated. On the other hand, if facts had been alleged by affidavit to the effect that, as the Court assumed, entry into the class of salmon net gear fishermen was dependent upon one's being hired by one already engaged in that trade, most certainly a factual dispute would exist in respect to appellees' motion and the required statement would have been filed. The fact that the court had to reach out for such evidence to support its decision underscores appellants' position that there was nothing properly before it upon which summary judgment could be rendered for appellees.

In the event that the District Court might not be willing to deny appellees' motion on the basis of the legal bases set forth in Part I hereof appellants urge that the court allow them an opportunity to furnish evidence upon the issue of the reasonableness of the

statute and regulations. Such evidence was not legally required in order for appellants to prevail, but may have been helpful to the court. The fact that additional evidence may be helpful to the court in resolving the issue in favor of appellants is quite different from appellants' position that there was no factual dispute relative to the necessity of denying appellees' motion for summary judgment. Judge Frank of the Second Circuit recognized this distinction in *Walling v. Richmond Screw Anchor Co.*, 154 F.2d 780 (2nd Cir. 1946). In that case each party moved for summary judgment. The Court of Appeals affirmed the granting of plaintiff's motion and commented:

> "It does not follow that, merely because each side moves for summary judgment, that there is no issue of material fact. For, although a defendant may, on his own motion assert that, accepting his legal theory, the facts are undisputed, he may be able and should always be allowed to show that, if plaintiff's legal theory be adopted, a genuine dispute as to a material fact exists." (154 F.2d at page 784)

Similarly, appellant should have been allowed to show in plenary proceedings, that as it candidly asserted, proven facts would justify the ultimate rendition of judgment in its favor. Those facts would have pertained to the reasonableness of the statute and regulations in the context of the salmon industry in Alaska. Such facts could have shown (1) whether or not management problems exist in respect to the

salmon fishing; (2) the effect over-accumulation of gear has had on management of resource; (3) expert testimony on what the effect of the proposed regulations would have on accumulation of salmon net gear; (4) whether or not safety problems exist in respect to the salmon industry; (5) whether or not law enforcement problems exist in respect to the salmon industry; (6) the effect of inexperience in the basic techniques of fishing upon safety and enforcement. The above is only the barest summary of what appellants should have been allowed to develop in plenary proceedings if the court was unwilling to hold the statute and regulations constitutional on their face. This they were not allowed to do because of the District Court's failure to recognize that what may have been helpful in the way of additional facts to support judgment for appellants may not at all be necessary to support appellants' position that appellees were not entitled to summary judgment as a matter of law on the basis of the facts then before the District Court.

CONCLUSION

For the reasons set forth above, appellants respectfully pray that this Court:

Reverse the order of the District Court granting summary judgment in favor of appellees and enter judgment in favor of appellants, or, in the event that this Court considers that remedy inappropriate, order one or both of the following:

1. That the District Court hold the case pending a determination by an Alaska Court of the Alaska constitutional issues;

2. That the District Court consider the merits of the within action in plenary proceedings.

Dated, Anchorage, Alaska,
November 24, 1969.

Respectfully submitted,

G. KENT EDWARDS,
Attorney General, State of Alaska,

By ROBERT L. HARTIG,
CHARLES K. CRANSTON,
Assistant Attorneys General, State of Alaska,
Attorneys for Appellants.